Supreme Court, U.S.
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No. 92-387

In The

Supreme Court of the United States

October Term, 1992

STEWART COUNTY, TENNESSEE, DAVID HICKS, JOE HENRY CRUTCHER, and WANDA LUFFMAN,

Petitioners,

v.

ALLEN D. HEFLIN, and wife JEAN LaRUE HEFLIN, and RUE ELLEN HEFLIN, next of kin and survivors of HUGH ALLEN HEFLIN, Deceased,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY OF PETITIONERS TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. THERE WAS ABSOLUTELY NO BASIS FOR THE IMPOSITION OF LIABILITY IN THE MATTER NOW BEFORE THIS COURT.

There was absolutely no basis whatever for the liability which has been imposed in the case now before this Court. Petitioners have simply pointed up the ways and manner in which the result from all of the proceedings below fails to accord with existing law, and of the ways in which these errors are reflected in the opinion below. Again, we are not looking at a factual dispute. Indeed, relatively few of the basic, operative facts in the record were at dispute in any significant degree. What we have here is a result which is contrary to existing law and contrary to accepted judicial custom and practice. The Petitioners are entitled to, and should, pursue their recourse, just as Respondents have freely pursued what they believed to be their recourse from the outset.

This case largely distills to two focal points: whether or not there was deliberate indifference; and, whether or not the body of the deceased should have been cut down immediately upon discovery. Unless one or both of these elements are in fact present, there is no possibility of liability.

As set forth in this Brief, and in our Petition for Writ of Certiorari (hereinafter "Petition"), neither are present. The no deliberate indifference requirement was met because prompt emergency medical care was rendered, *even to the point of sending for it before the actual discovery of the body took place*. As to the second focal point, there was no constitutional right of a pre-trial detainee suicide to be cut down immediately upon discovery. In order for liability to obtain, such a right would have to have been pre-existing, and clearly established in the law.

Skirting these simple realities, Respondents *inter alia* effectively argue that it is now "too late" for this Court to redress this matter. Far from it. The Respondents have simply

not met the proper legal standard for the imposition of liability in this case. Accordingly, it is within the well-established province of this Court to redress the matter. In the somewhat structurally similar case of *City of St. Louis v. Praprotnik,* 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988), the United States Supreme Court reversed and remanded a decision, finding in relevant part that the respondent had failed to establish the existence of an unconstitutional governmental policy, which would have been necessary in order to impose liability against the governmental entity. The Court rejected the respondent's contention that the issue had not been preserved for review, finding that although the petitioner itself had proffered the relevant jury instruction, that the failure to object to a jury instruction does not render the instruction to be the law of the case for purposes of appellate review of the denial of a directed verdict or judgment notwithstanding the verdict motion. *Id.*, at 108 S.Ct. 922.

This Honorable Court reasoned that the petitioner's legal position in the District Court, as well as in its petition for writ of certiorari had been consistent; namely, that the respondent had failed to establish the existence of an unconstitutional governmental policy. So also here, where the Petitioners' position has been consistent throughout: that there was no deliberate indifference, and that there was no constitutional violation by virtue of the fact that the deceased was not cut down immediately upon discovery.

This Court went on to observe in *City of St. Louis, supra,* at 108 S.Ct. 922, that it "should not be surprising" if the petitioner's arguments in the district court were much less detailed than the arguments it now made in response to the decision of the court of appeals. That, reasoned this Court, does not imply that the petitioner had failed to preserve the issue raised. *Id.*

Also observing that the petitioner had throughout the litigation been confronted with a "legal landscape" whose contours are in a "state of evolving definition" (*Id.* at 922), this Court proceeded to decide the merits. We respectfully submit that we, too, have been confronted with a similar legal

landscape. Just as this Court in *City of St. Louis, supra,* proceeded to address a matter which "manifestly need[ed] clarification" (*Id.* at 922), so also we respectfully submit that this Court should address the matters presented by this case, which can be said to be susceptible to clarification.

The United States Supreme Court, in the case of *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985), held that a single act of misconduct by a street officer was an insufficient basis upon which to impose liability against the governmental entity. *Id.*, at 471 U.S. 823-24, 105 S.Ct. at 2436. What we really have in this case, if anything, is a single incident. Let us assume *arguendo* and just for a moment that the activity was unconstitutional. There was absolutely no proof that it was caused by an existing, unconstitutional governmental policy, which could be attributed to any governmental policy maker. There can be no question that the prompt medical requirement of the deliberate indifference standard was met, since medical care was summoned even before the discovery of the deceased's body. The only remaining point is that of the right to be cut down, if any. Since there is no constitutional right to be cut down immediately upon discovery under these circumstances, there was no unconstitutional governmental policy. Therefore, there could be no proof that the failure to cut down [not even unconstitutional in and of itself], was caused by an existing unconstitutional governmental policy. *See*, also, *Martin v. Swift et al.*, 781 F.Supp. 1250 (E.D.Mich. 1992). As the Court in Tuttle observed, " . . . some limitation must be placed on establishing municipal liability through policies that are not themselves unconstitutional. . . . Obviously, if one retreats far enough from a constitutional violation, some municipal 'policy' can be identified behind almost any such harm inflicted by a municipal official: for example, Rotramel [the officer] would never have killed Tuttle [the decedent] if Oklahoma City did not have a 'policy' of establishing a police force." *Id.*, at 105 S.Ct. 2436.

Indeed, it is all too often forgotten that 42 U.S.C. § 1983 does not in and of itself establish liabilities, but rather it only

provides remedies for violations of previously-extant constitutional rights. Since there were no violations in the matter now before this Court, there can be no entitlement to remedies. *Tuttle, supra,* at 105 S.Ct. 2432.

Some other points made by Respondents must be addressed: Respondents incorrectly state that the Sixth Circuit opinion "noted" that the record contained an "abundance of evidence" supporting the jury's alleged factual finding. (Res. Brief in Opp., page 3.) However, what the opinion says (petitioner Appendix A10) was that it was *Plaintiffs' position* that there was an abundance of evidence in that regard.

Contrary to Respondents' contention of mootness on the issue of whether there was a pre-existing, clearly-established right extant, of a pretrial detainee, would-be suicide, to be immediately cut down upon discovery (which they characterize as the application of the qualified immunity rule), that aspect of the case is not moot at all. Indeed, as discussed *supra*, there was no right extant at the time, there was no violation, and there is no liability upon the part of anyone, Stewart County or otherwise. That aspect of the case remains very vital.

Respondents complain (Res. Brief in Opp., page 7) that Petitioners have not cited cases in which circuit courts have held that a standard "other than the deliberate indifference standard applies to pretrial detainee jail suicide cases." However, that is not the issue. There was *no* clearly-established right of a would-be jail suicide pretrial detainee to be cut down immediately upon discovery. *See, Cross v. City of Des Moines et al.,* 965 F.2d 629 (8th Cir. 1992); *Pesek v. City of Brunswick et al.,* 794 F.Supp. 768 (N.D.Ohio 1992); *Rich v. City of Mayfield Heights,* 955 F.2d 1092 (6th Cir. 1992). Therefore, it necessarily follows that failure to cut down a would-be suicide pretrial detainee immediately upon discovery is not deliberate indifference. There either is or is not such a right. There is not. *Id.* "Deliberate indifference" operates within the parameters of constitutional minimums; it does not operate in the theoretical ivory-tower abstract. *See,* for example, *Kohatsu v. U.S.,* 351 F.2d 898 (Ct.App.Cal. 1965); and, by analogy, *City of Los Angeles v. Lyons,* 461 U.S. 95,

103 S.Ct. 1660, 75 L.Ed.2d 675 (1983); *O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974). Therefore, there was no deliberate indifference.

Respondents completely misunderstand *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239 (1983). Respondents would relegate this case to answering the question of who pays the bill. However, the determination made therein of that question necessarily rested first upon a finding that the governmental entity's constitutional due process obligation had been fulfilled because the police there had taken the injured party to a hospital promptly in order that he might be provided necessary medical treatment. If the conduct there was sufficient to fulfill due process constitutional considerations, then the same conduct here of prompt medical attention is also sufficient (again, recall that this decedent was already dead – medical attention, prompt or otherwise, changed nothing).

Respondents baldly assert that our request for this Court to exercise its supervisory power of jurisprudence is based merely on our "disagreement" with what it characterizes as the Sixth Circuit's evidentiary review. They fail to explain why such is the case, however.

They then also conclude that the Sixth Circuit did not see any conflict between this case and the earlier case of *Rich, supra*. However, is it axiomatic that a denial of appellate review has no precedential authority or weight. *See, Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (. . . a denial of certiorari imports no expression of opinion on the merits of the case, and, concomitantly, opinions accompanying such denial cannot have the same effect as decisions on the merits); *United States v. Carver*, 260 U.S. 482, 483 S.Ct. 181, 67 L.Ed. 361 (1923); *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973); and, *Brown v. Allen*, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953).

Neither does the denial of a rehearing *en banc* import any precedential significance. *See, Harris v. Luckey*, 918 F.2d 888 (11th Cir. 1990) (denial of a request for a rehearing *en banc* does not have precedential weight); *Luckey v. Miller*, 929 F.2d

618 (11th Cir. 1991) (the summary denial of a petition for rehearing *en banc* was insufficient to confer any implication or inference regarding the majority's opinion as to the merits of the case).

Respondents conclude that the principal purpose for the exercise of certiorari jurisdiction by this Court is to resolve conflicts between the circuits, and impliedly therefore not within the circuits. However, since this case conflicts with both intra-circuit and extra-circuit authority (as set forth in our Petition) the argument goes nowhere and is pointless.

Respondents characterize one of our "Questions presented for review" as asking this Court to decide whether or not a nonqualified expert may give testimony concerning legal conclusions. However, that is not the case. We simply believe that that is one of the questions presented for review by this matter, and we ask for an opportunity to fully brief this Court and "on the merits" on what we believe to be the correct state of law as regards that matter in the light of this case. Only *then* do we ask this Court to decide whether that rule of law was followed in this case.

Perhaps realizing the correctness of our positions, Respondents characterize the admission of the testimony of Mr. Totten, the nonqualified expert, as being consistent with the "philosophy" (Res. Brief in Opp., page 10) of the Federal Rules of Evidence, Rule No. 704. Such is not enough. The rules are what they are. One individual's interpretation of the "philosophy" behind a particular rule is irrelevant. The rules are very precise, and are meant to be so, in order that unfair, prejudicial, inflammatory and extraneous material will not be injected into the judicial consideration of a claim. That purpose was not accomplished here, however.

Rather than merely having evidence admitted which simply "told" the jury how to decide the case (*see*, Dissent by Justice Kennedy, *Heflin et al. v. Stewart County, Tennessee et al.*, 958 F.2d 709, 719 (6th Cir. 1992)), the Petitioners were entitled to have evidence admitted which was in conformance

with the Federal Rules of Evidence. What Respondents characterize as legally sufficient reasons, and cautionary measures, simply do not avoid the damage which was done by the improper admission of that nonqualified testimony.

It is clear that, unlike Respondents' characterization states, the improper admission of this Totten testimony created a conflict not only with the Sixth Circuit case of *Torres v. County of Oakland*, 758 F.2d 147 (1985), but also with other authorities, to-wit:

(1) The Sixth Circuit case of *McGowan et al. v. Cooper Industries, Inc. et al.*, 863 F.2d 1266 (6th Cir. 1988): "afford ample assurances against the admission of opinions which would merely tell the jury what result to reach. . . . They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria." *McGowan, supra*, at 863 F.2d 1272.

(2) The Eighth Circuit case of *Hogan v. American Telephone & Telegraph Co.*, 812 F.2d 409 (8th Cir. 1987), quoted *Torres, supra*, as it observed that the proper analytical focus is whether the evidence is helpful to the fact-finder. *Hogan, supra*, at 812 F.2d 411. That Court further observed that opinion testimony is not helpful to the fact-finder if it is couched as a legal conclusion, again citing *Torres, supra*, and noted that the requirement of "helpfulness" gives assurance against the admitting of opinions which would in essence *tell the fact-finder what result to reach. Hogan, supra*, at 812 F.2d 411.

The *Hogan* Court also cited with approval the earlier case of *Owen v. Kerr McGee Corp.*, 698 F.2d 236 (5th Cir. 1983), for the proposition that a question which asks for a legal conclusion supplies the fact-finder with no information other than that which answers the question of what the witness believes the verdict should be. *Hogan, supra*, at 812 F.2d 411, citing *Owen, supra*, at 698 F.2d 240.

(3) The Second Circuit case of *United States v. Scop et al.*, 846 F.2d 135 (2nd Cir. 1988), cited *Torres, supra*, with approval, for the proposition that testimony containing a legal conclusion is improper and inadmissible because it conveys to the jury the witness' unexpressed, and perhaps erroneous, legal standards. *Scop, supra*, at 846 F.2d 140.

The *Scop* Court's rejection of the expert witness' testimony was based upon an analysis which reasoned that the opinions were calculated to invade the Court's province in determining the applicable law and in instructing the jury as to that law, and therefore they could not have been helpful to the jury in carrying out the jury's legitimate functions. *Id.*, at 846 F.2d 140 (citations omitted).

The conflict of the opinion and result below with the foregoing authorities is thus ripe for correction.

II. AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION IS CALLED FOR PURSUANT TO UNITED STATES SUPREME COURT RULE NO. 10.

Respondents seek to distract this Court from a proper exercise of its power of supervision pursuant to its own Rule No. 10, by glibly assuring the Court that all that is really at issue here is simply a disagreement of the Petitioners with the "factual finding" of the jury. However, the problem here is not so simple. Rather, the issue here is that liability has been imposed for which there is absolutely no basis.

Respondents effectively argue, in nutshell form, that because they presented self-serving testimony that their decedent could have survived certain lengths of time under various postulated hypothetical scenarios, and because they presented a witness who testified that he thought there had been deliberate indifference, that they are entitled to have this factual finding [sic] affirmed by default, simply through inaction on the part of this Court.

However, in painting this mural, Respondents fail utterly to address the crux of this matter. *The decedent was already*

dead. Unfortunate, yes; tragic, yes; but true. The decedent was dead when he was first discovered, and was examined by several different individuals, each of whom confirmed that he was in fact dead. (*Crutcher*: 1 Trial transcript at 153:3-155:16; *Hollis*: 2 Trial Transcript at 202:3-7, 220:20-222:23, 223:1-14; *Bagwell*: 2 Trial Transcript at 223:1-14; *Lee*: 1 Trial Transcript at 118:9-17). Yet even before this tragic discovery took place, there had been a *prediscovery* summoning of emergency medical help (1 Trial Transcript at 149:17-19), and thus *even before* the jail official, Deputy Sheriff Larry Joe Crutcher, learned that there was an actual medical emergency (1 Trial Transcript at 148:2-22), he had summoned emergency medical help. This help arrived promptly (2 Trial Transcript at 201:15-202:2) and consisted of two paramedics (2 Trial Transcript at 201:15-202:2) who performed an examination upon the decedent's body (2 Trial Transcript at 202:3-6, 223:1-14). The medical provider, Dr. Lee, arrived shortly thereafter (2 Trial Transcript at 206:10-17).

But, even assuming the evidence was not clear that the decedent was already dead upon discovery, and therefore beyond help, it does not follow that Respondents are entitled to the relief which they have been granted. There was no clearly-established constitutional right extant of a would-be suicide to be immediately cut down upon discovery. *See, Cross v. City of Des Moines et al., supra; Pesek v. City of Brunswick et al., supra; Rich, supra*, at 955 F.2d 1097.

This being the case, the decedent's rights were in no wise violated under any scenario, even those hypothetical ones postulated by Respondents. Since there was no violation of a clearly-established constitutional right which was in existence at the time of the suicide, there was no entitlement to relief. What Respondents' case really distills to is an award on a *de facto* automatic basis, simply because their decedent committed suicide while incarcerated. This central core crux and result, that liability has been imposed where there was no basis whatever for it, is the result which demands the intervention of this Court. This is the basis for certiorari.

Respondents fail to address this aspect of the matter, because there is no answer to it. The rules of this Court mandate that it may exercise its supervisory power in a case such as this, where, as contemplated by Rule 10, a departure has occurred from the usual and accepted course of judicial proceedings as enumerated *supra*; where there is a conflict with decisions of this Court, and where there is a conflict either with decisions of the same circuit, or with decisions of other federal courts of appeal. All of these elements are not, as set forth herein and in our Petition.

CONCLUSION

An overview of Respondents' Brief in Opposition reveals that the position they are advancing at this juncture contains the same flaws which have been present throughout. They have taken a set of tragic facts, but yet a set of facts which gave rise to no liability, and painted upon that set a superstructure of conjecture; it is upon that conjecture that they have demanded relief where there is no liability *ab initio*. The decedent was already dead upon discovery, and the record so shows. (*Crutcher*: 1 Trial Transcript at 153:3-155:16; *Hollis*: 2 Trial Transcript at 202:3-7, 220:20-222:23, 223:1-14; *Bagwell*: 2 Trial Transcript at 223:1-14; *Lee*: 1 Trial Transcript at 118:9-17). *Ex post facto* liability will not undo that tragic fact. There were no constitutional deprivations, and there is no liability.

For the reasons set forth herein and in the Petition for Writ of Certiorari, the Petitioners hereby renew their request for relief as set forth in said Petition.

Respectfully submitted,

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